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AI Hiring Tools Could Draw Increased EEOC Scrutiny

By Daniel Butler and Kevin White
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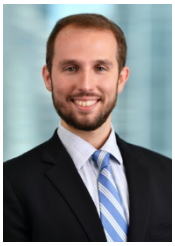


Last month, the U.S. Equal Employment Opportunity Commission held a webinar on artificial intelligence in the workplace. Commissioner Keith Sonderling explained that the agency recognizes the potential for AI to mitigate unlawful human bias, but is wary of rapid, undisciplined implementation that may perpetuate or accelerate such bias.

As a result, Sonderling remarked that the EEOC may use commissioner charges — agency-initiated investigations unconnected to an employee's charge of discrimination — to ensure employers are not using AI in a manner that violates Title VII of the Civil Rights Act or the Americans with Disabilities Act.

Employers using or contemplating AI should heed the EEOC's awareness of this issue and take steps to ensure they minimize the risks and maximize the benefits of using AI in the workplace.

This article will offer an overview of the EEOC's interest in the subject, provide a refresher course on commissioner charges and propose actions that employers can take to reduce the risk of becoming the target of such charges.

The EEOC's Interest in Artificial Intelligence

Last month's webinar may reflect the agency's response to a December 2020 letter, authored by 10 U.S. senators, asking the agency to focus on employers' use of artificial intelligence, machine learning and other hiring technologies that may result in unlawful discrimination.

This recent congressional interest aside, the EEOC's effort to grapple with AI is not new. The agency previously held[1] a public meeting in October 2016 discussing the use of big data in the workplace and implications for employers.

Employment lawyers and computer scientists at that meeting agreed that AI, such as automated candidate sourcing, resume screening or video interview analysis, is not a panacea for employment discrimination.

The technology, if not carefully implemented and monitored, can introduce and even exacerbate unlawful bias. This is because algorithms generally rely on a set of human inputs, such as resumes of high-performing existing employees, to guide their analysis of candidates. If those inputs lack diversity, the algorithm may reinforce existing institutional bias at breakneck speed.

Commissioner Charges as a Tool to Investigate AI-Based Discriminatory Impacts

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The potential for AI to reject hundreds or thousands of job applicants based on biased inputs or flawed algorithms has the EEOC's attention.

And because job applicants are often unaware that they were excluded from certain positions because of flawed or improperly calibrated AI software, the EEOC may rely upon commissioner charges as an important tool to uncover unlawful bias under Title VII and the ADA, most likely under the rubric of disparate impact discrimination.

Title 42 of the U.S. Code, Section 2000e-5(b), authorizes the EEOC to investigate possible discrimination "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission." Unlike employee-initiated charges, commissioner charges can be proposed by "any person or organization."

Indeed, it is the origin which distinguishes commissioner charges from employee-initiated ones.

EEOC regulations contemplate a procedure whereby regional field offices refer proposed requests for commissioner charges to the EEOC's executive secretariat, who then distributes such requests to the commissioners on a rotating basis. A commissioner then determines whether to sign a proposed charge, authorizing the field office to perform an investigation.

Commissioners, however, can bypass this referral procedure and file a charge directly with a regional field office.

The requirements for commissioner charges do not differ from those initiated by an employee. Charges must be signed and verified. Additionally, they must provide a clear and concise statement of the facts constituting the alleged unlawful employment practices

The information for such charges can come from any source. The EEOC has explained that commissioner charges generally come about if:

- A field office learns of possible discrimination from local community leaders, direct observation or from a state-run fair employment office;
- A field office learns of a possible pattern or practice of discrimination during its investigation of an employee charge; or
- A commissioner learns about discrimination and asks a field office to perform an investigation.

Once filed, commissioner charges follow the same procedure as employee-initiated charges. The respondent is notified of the charge, and the EEOC requests documents and/or interviews with company personnel. If needed, the agency can utilize its administrative subpoena power and seek judicial enforcement.

The EEOC's regulations provide that the commissioner who signed the charge must abstain from making a determination in the case.

If the agency ultimately determines that there is reasonable cause to believe discrimination occurred, the EEOC will attempt conciliation with the employer.

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The same remedies generally available under Title VII disparate impact claims — equitable relief in the form of back pay and/or injunctive relief — are available to aggrieved individuals.

No Official Guidance Yet From the EEOC

Although the EEOC has flagged these issues several times, it has not yet issued written guidance on the use of AI in employment decisions.

In his recent remarks, Sonderling confirmed that the most relevant guidance document is over 40 years old. He was referring to the EEOC's 1978 Uniform Guidelines on Employee Selection Procedures.

That guidance, written in the wake of the 1960s civil rights movement, outlines different ways employers can show that employment tests and other selection criteria are job-related and consistent with business necessity.

Although dated, the same principles that justified the validity of selection procedures in the 1970s can guide employers using AI today.

One such method, called the 80% rule, explains that a selection rate for any race, sex or ethnic group that is less than 80% of the selection rate for the group with the highest selection rate constitutes a "substantially different rate of selection," indicating possible disparate impact. The EEOC often uses this rule to determine whether reasonable cause exists to believe unlawful discrimination occurred.

Steps to Mitigate Discrimination Risks

Employers should be mindful of the EEOC's awareness on this topic and the availability of commissioner charges to uncover disparate impacts without the need for an employee charge. To avoid being the target of such investigations, employers should consider the steps outlined below.

First, employers considering an AI tool should demand that AI vendors disclose sufficient information to explain how the software makes employment decisions.

Vendors often do not want to disclose proprietary information relating to how their tools function and interpret data. Employers may ultimately be liable for their results, however, so it is important that they understand how candidates are selected.

At minimum, an employer should obtain strong indemnity rights.

Second, even after obtaining assurances and indemnification, employers should consider auditing the AI tool before relying upon it for decisions.

To do this, employers need to be able to identify the candidates the tool rejected, not just those who were accepted. Thus, employers should verify with vendors that data is preserved so that they can properly audit the tool and examine results to determine whether there was a negative impact on individuals in protected classes.

This auditing should occur regularly — not solely at initial implementation.

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Third and perhaps most critically, employers should ensure that the input or training data upon which the tool relies — e.g., resumes of model employees — does not reflect a homogenous group. If the input data reflects a diverse workforce, a properly functioning algorithm should, in theory, replicate or enhance that diversity.

Finally, as this is an emerging field, employers need to stay abreast of developments in the law. When in doubt, employers should consult with employment counsel when deciding whether and how to use AI to improve the productivity, diversity and capability of their workforce.

Notes

1. https://www.eeoc.gov/meetings/24068/transcript.

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